

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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IN RE: WESTERN STATES) MDL 1566
WHOLESALE NATURAL GAS) 2:03-CV-01431-PMP-PAL
ANTITRUST LITIGATION) BASE FILE

LEARJET, INC.; CROSS OIL REFINING)
& MARKETING, INC.; and TOPEKA) 2:06-CV-00233-PMP-PAL
UNIFIED SCHOOL DISTRICT 501 on)
behalf of themselves and all other similarly)
situated direct purchasers of natural gas in)
the State of Kansas,)

ORDER RE: DEFENDANTS' MOTION
TO DISMISS (Doc. #961)

Plaintiffs,

v.

ONEOK, INC., et al.,

Defendants.

Presently before this Court is Specially Appearing Defendants CMS Energy Corporation, Duke Energy Carolinas, LLC, and Reliant Energy, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction (Doc. #961)¹ with Joint Memorandum (Doc. #963). Defendants filed separate volumes of exhibits (Doc. #968, #974, #976) in support.² Plaintiffs filed Oppositions (Doc. #1080, #1083, #1106) and supporting appendices (Doc. #1081, #1084, #1125, #1126, #1142). Defendants filed Replies (Doc. #1176, #1185, #1189).

¹ Document numbers refer to the base file, 2:03-CV-01431-PMP-PAL, unless otherwise noted.

² Defendants Reliant Energy, Inc. and Reliant Energy Services, Inc. also entered into a stipulation of fact (Doc. #1054) with Plaintiffs.

I. BACKGROUND

This case is one of many in consolidated Multidistrict Litigation arising out of the energy crisis of 2000-2001. Plaintiffs originally filed the above action in the District Court of Wyandotte County, Kansas. (Notice of Removal, First Am. Compl. [2:06-CV-00233-PMP-PAL, Doc. #1].) Defendants removed the case to the United States District Court for the District of Kansas. (Id.) The Judicial Panel on Multidistrict Litigation entered a Transfer Order pursuant to 28 U.S.C. § 1407 centralizing the foregoing action in this Court for coordinated or consolidated pretrial proceedings. (Letter dated June 14, 2006 [2:06-CV-0233-PMP-PAL, Doc. #41-1].)

In this litigation, Plaintiffs seek to recover damages on behalf of natural gas rate payers. In the First Amended Complaint (“FAC”), Plaintiffs allege Defendants engaged in anti-competitive activities with the intent to manipulate and artificially increase the price of natural gas for consumers. (First Am. Compl. at 30-32.) Specifically, Plaintiffs allege Defendants knowingly delivered false reports concerning trade information and engaged in wash trades, in violation of Kansas Statutes Annotated § 50-101, et seq. (Id.)

Plaintiff Learjet, Inc. (“Learjet”) is a Delaware corporation with its principal place of business in Wichita, Kansas. (Id. at 3.) Plaintiff Cross Oil Refining & Marketing, Inc. (“Cross Oil”) is a Delaware corporation with offices located in Kansas. (Id.) Plaintiff Topeka Unified School District 501 (“Topeka”), is a local government unit, organized under the laws of the State of Kansas with its headquarters in Kansas. (Id. at 4.) Plaintiffs allege they purchased natural gas directly from one or more Defendants, and from other natural gas sellers in the State of Kansas, during the years 2000-2002. (Id. at 3-4.)

The FAC’s allegations are directed generally at two types of Defendants: the natural gas companies that actually engaged in natural gas sales and the related reporting of allegedly manipulated gas prices to the trade indices, and those companies’ parent corporations. The FAC does not allege the parent company Defendants themselves engaged

1 in natural gas trading and price reporting. Rather, the FAC alleges these Defendants are the
2 parent companies of subsidiaries which engage in such activity generally, and which also
3 made natural gas sales in Kansas during the relevant time period.

4 Plaintiffs seek to establish personal jurisdiction over the parent company
5 Defendants based on their out-of-forum activities directed at Kansas along with their
6 subsidiaries' and affiliates' contacts within Kansas. According to the FAC, the parent
7 company Defendants dominated and controlled their respective subsidiaries and the parent
8 company Defendants "entered into a combination and conspiracy . . . which tended to
9 prevent full and free competition in the trading and sale of natural gas, or which tended to
10 advance or control the market prices of natural gas." (Id. at 4, 7, 11, 13, 15, 17, 19, 23, 25-
11 27.) Plaintiffs allege the parent company Defendants intended their actions to have a direct,
12 substantial, and foreseeable effect on commerce in the State of Kansas. (Id. at 4, 7, 11, 13,
13 15, 17, 19, 23, 25-27.) According to the FAC, the parent company Defendants "made
14 strategic marketing policies and decisions concerning natural gas and the reporting of
15 natural gas trade information to reporting firms for use in the calculation of natural gas
16 price indices that affected the market prices of natural gas, and those policies and decisions
17 were implemented on an operational level by affiliates . . . in the United States and in
18 Kansas." (Id. at 5, 7-8, 11, 13-14, 16-17, 20, 23, 25-28.)

19 Parent company Defendants CMS Energy Corporation, Duke Energy Carolinas,
20 LLC, and Reliant Energy, Inc. now move to dismiss, arguing this Court lacks personal
21 jurisdiction over them. According to these Defendants, they conduct no business in Kansas
22 and have no other contacts supporting general or specific jurisdiction. Defendants also
23 argue they cannot be subject to jurisdiction in Kansas based on their subsidiaries' contacts
24 with the forum because their subsidiaries are not their agents or alter egos. Defendants thus
25 argue exercising personal jurisdiction in this case would violate constitutional due process
26 requirements.

1 Plaintiffs respond that Defendants' subsidiaries have submitted to jurisdiction in
2 Kansas and Defendants are subject to personal jurisdiction through agency and alter ego
3 principles based on their subsidiaries' contacts with the forum. Additionally, Plaintiffs
4 request the Court defer ruling until after the magistrate judge resolves certain jurisdictional
5 discovery disputes, or to delay ruling on the jurisdictional question until merits discovery is
6 completed because the jurisdictional questions are intertwined with the merits.

7 **II. LEGAL STANDARDS**

8 "When a defendant moves to dismiss for lack of personal jurisdiction, the
9 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
10 defendant." Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). To meet this
11 burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1)
12 permitted under the applicable state's long-arm statute and (2) that the exercise of
13 jurisdiction does not violate federal due process. Id. The Court must analyze whether
14 personal jurisdiction exists over each defendant separately. Harris Rutsky & Co. Ins.
15 Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1130 (9th Cir. 2003).

16 Where the issue is before the Court on a motion to dismiss based on affidavits
17 and discovery materials without an evidentiary hearing, the plaintiff must make "a prima
18 facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid
19 dismissal." Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114,
20 1119 (9th Cir. 2002). The Court accepts as true any uncontroverted allegations in the
21 complaint and resolves any conflicts between the facts contained in the parties' evidence in
22 the plaintiff's favor. Id. However, for personal jurisdiction purposes, a court "may not
23 assume the truth of allegations in a pleading which are contradicted by affidavit."
24 Alexander v. Circus Circus Enters., Inc., 972 F.2d 261, 262 (9th Cir. 1992) (quotation
25 omitted).

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1 In diversity cases such as this, “a federal court applies the personal jurisdiction
 2 rules of the forum state provided the exercise of jurisdiction comports with due process.”
 3 Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). However, “federal law is controlling
 4 on the issue of due process under the United States Constitution.” Data Disc, Inc. v. Sys.
 5 Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3 (9th Cir. 1977); see also Dole Food Co., Inc. v.
 6 Watts, 303 F.3d 1104, 1110 (9th Cir. 2002). Therefore, the Court will apply law from the
 7 United States Court of Appeals for the Ninth Circuit in deciding whether jurisdiction is
 8 appropriate under the Due Process Clause. See In re Korean Air Lines Disaster of Sept. 1,
 9 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (concluding that “the transferee court [should]
 10 be free to decide a federal claim in the manner it views as correct without deferring to the
 11 interpretation of the transferor circuit”); Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir.
 12 1993) (holding that “a transferee federal court should apply its interpretations of federal
 13 law, not the constructions of federal law of the transferor circuit”).

14 To satisfy federal due process standards, a nonresident defendant must have
 15 “minimum contacts” with the forum state so that the assertion of jurisdiction does not
 16 offend traditional notions of fair play and substantial justice. Pebble Beach Co., 453 F.3d at
 17 1155 (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945)). A federal district
 18 court may exercise either general or specific personal jurisdiction. See Helicopteros
 19 Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984).

20 To establish general personal jurisdiction, the plaintiff must demonstrate the
 21 defendant has sufficient contacts to “constitute the kind of continuous and systematic
 22 general business contacts that ‘approximate physical presence.’” Glencore Grain, 284 F.3d
 23 at 1124 (quoting Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082, 1086 (9th
 24 Cir. 2000), modified, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433
 25 F.3d 1199, 1207 (9th Cir. 2006)). Courts consider such factors as whether the defendant
 26 makes sales, solicits or engages in business in the state, serves the state’s markets,

1 designates an agent for service of process, holds a license, or is incorporated there.

2 Bancroft, 223 F.3d at 1086. “[A] defendant whose contacts are substantial, continuous, and
3 systematic is subject to a court’s general jurisdiction even if the suit concerns matters not
4 arising out of his contacts with the forum.” Glencore Grain, 284 F.3d at 1123 (citing
5 Helicopteros, 466 U.S. at 415 n.9).

6 A nonresident defendant’s contacts with the forum state may permit the exercise
7 of specific jurisdiction if: (1) the defendant has performed some act or transaction within
8 the forum or purposefully availed himself of the privileges of conducting activities within
9 the forum, (2) the plaintiff’s claim arises out of or results from the defendant’s forum-
10 related activities, and (3) the exercise of jurisdiction over the defendant is reasonable.
11 Pebble Beach Co., 453 F.3d at 1155-56. “If any of the three requirements is not satisfied,
12 jurisdiction in the forum would deprive the defendant of due process of law.” Omeluk v.
13 Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

14 Under the first prong of the “minimum contacts test,” the plaintiff must establish
15 either that the defendant “(1) purposefully availed himself of the privilege of conducting his
16 activities in the forum, or (2) purposefully directed his activities toward the forum.” Pebble
17 Beach Co., 453 F.3d at 1155. “Evidence of availment is typically action taking place in the
18 forum that invokes the benefits and protections of the laws in the forum.” Id. Evidence of
19 direction usually consists of conduct taking place outside the forum that the defendant
20 directs at the forum. Id. at 1155-56.

21 The purposeful direction aspect of the first prong is satisfied when a foreign act is
22 both aimed at and has effect in the forum. Id. In other words, the defendant “must have (1)
23 committed an intentional act, which was (2) expressly aimed at the forum state, and (3)
24 caused harm, the brunt of which is suffered and which the defendant knows is likely to be
25 suffered in the forum state.” Id. To satisfy the third element of this test, the plaintiff must
26 establish the defendant’s conduct was “expressly aimed” at the forum; a “mere foreseeable

1 effect” in the forum state is insufficient. Id. The “express aiming” requirement is satisfied
2 when the defendant is alleged to have engaged in wrongful conduct “individually targeting
3 a known forum resident.” Bancroft, 223 F.3d at 1087.

4 The second prong of the specific jurisdiction test requiring that the contacts
5 constituting purposeful availment or purposeful direction give rise to the current action is
6 measured in terms of “but for” causation. Id. at 1088. “If the plaintiff establishes both
7 prongs one and two, the defendant must come forward with a ‘compelling case’ that the
8 exercise of jurisdiction would not be reasonable.” Boschetto v. Hansing, 539 F.3d 1011,
9 1016 (9th Cir. 2008) (quotation omitted).

10 A. Alter Ego

11 A “parent-subsidary relationship alone is insufficient to attribute the contacts of
12 the subsidiary to the parent for jurisdictional purposes.” Harris Rutsky & Co. Ins. Servs.,
13 Inc., 328 F.3d at 1134. However, a subsidiary’s contacts may be imputed to its parent for
14 personal jurisdiction purposes where the subsidiary is the parent’s alter ego. Id.

15 To demonstrate a parent and its subsidiary are alter egos, the plaintiff must
16 establish a prima facie case that the two companies share “such unity of interest and
17 ownership” that the companies’ separateness no longer exists and “failure to disregard
18 [their separate identities] would result in fraud or injustice.” Doe v. Unocal Corp., 248 F.3d
19 915, 926 (9th Cir. 2001) (quotation omitted). To demonstrate a unity of interest warranting
20 disregard of corporate separateness, the plaintiff must show the parent controls its
21 subsidiary to such a degree as to render the subsidiary a “mere instrumentality” of its parent.
22 Id. (quotation omitted). Typically, this would involve showing the parent controls the
23 subsidiary’s internal affairs or daily operations. Kramer Motors, Inc. v. British Leyland,
24 Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980).

25 A parent corporation may be involved directly in certain aspects of its wholly
26 owned subsidiary’s affairs without subjecting itself to alter ego status. For example, a

1 parent may provide financing to its subsidiary so long as it maintains corporate formalities
2 and properly documents loans and capital contributions to its subsidiaries, and it may act as
3 its subsidiary's guarantor. Doe, 248 F.3d at 927-28. Additionally, a parent may refer to its
4 subsidiaries as divisions of the parent in annual reports. Id. at 928. Further, a parent may
5 review and approve major decisions, place its own directors on the subsidiary's board, and
6 share offices and staff with its wholly owned subsidiary without being considered its alter
7 ego. Id.; Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135.

8 In sum, a parent may involve itself directly in its subsidiary's activities without
9 becoming an alter ego "so long as that involvement is consistent with the parent's investor
10 status." Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135 (quotation omitted).
11 Activities consistent with investor status include "monitoring of the subsidiary's
12 performance, supervision of the subsidiary's finance and capital budget decisions, and
13 articulation of general policies and procedures[.]" Doe, 248 F.3d at 926 (quoting United
14 States v. Bestfoods, 524 U.S. 61, 72 (1998)).

15 In addition to showing lack of corporate separateness, the plaintiff also must
16 show that failure to disregard the corporate form would promote fraud or injustice. The
17 fraud or injustice must relate to the forming of the corporation or abuse of the corporate
18 form, not a fraud or injustice generally. Laborers Clean-Up Contract Admin. Trust Fund v.
19 Uriarte Clean-Up Serv., Inc., 736 F.2d 516, 524-25 n.12 (9th Cir. 1984). For example,
20 undercapitalization at the subsidiary's inception may be evidence of the parent's fraudulent
21 intent. Id. However, a corporation that once was capitalized adequately but "subsequently
22 fell upon bad financial times" does not support a finding of fraud or injustice. Id. at 525.
23 Further, evidence that the corporation existed as an ongoing enterprise engaged in
24 legitimate business suggests no fraudulent intent or injustice to support piercing the
25 corporate veil. Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1113 (9th Cir. 1979).

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1 An inability to collect on a judgment “does not, by itself, constitute an inequitable result.”³

2 Id.

3 **B. Agency**

4 A subsidiary’s contacts also may be imputed to its parent for personal jurisdiction
5 purposes where the subsidiary is the parent’s general agent in the forum. Harris Rutsky &
6 Co. Ins. Servs., Inc., 328 F.3d at 1134. A subsidiary is its parent’s agent for purposes of
7 attributing its forum-related contacts to the parent if the subsidiary “performs services that
8 are ‘sufficiently important to the foreign corporation that if it did not have a representative
9 to perform them, the corporation’s own officials would undertake to perform substantially
10 similar services.’” Doe, 248 F.3d at 928 (quoting Chan v. Society Expeditions, Inc., 39
11 F.3d 1398, 1405 (9th Cir. 1994)). The ultimate inquiry is whether the subsidiary’s presence
12 in the forum “substitutes” for its parent’s presence. Id. at 928-29 (quotation omitted).

13 Where the parent is merely a holding company, the subsidiary’s forum-related
14 contacts are not done as the parent’s agent because the holding company “could simply hold
15 another type of subsidiary” as an investment and thus the subsidiary conducts business not
16 as the parent’s agent but as its investment. Id. at 929. “Where, on the other hand, the
17 subsidiaries are created by the parent, for tax or corporate finance purposes, there is no
18 basis for distinguishing between the business of the parent and the business of the
19 subsidiaries.” Id. (quotation omitted). The inquiry as to whether a subsidiary is its parent’s
20 general agent in the forum is “a pragmatic one.” Gallagher v. Mazda Motor of Am., Inc.,

21
22 ³ Kansas employs a similar alter ego test. Under Kansas law, corporations are alter egos “when
23 there is such domination of finances, policy, and practices that the controlled corporation has no
24 separate mind, will, or existence of its own and is but a business conduit for its principal.” Dean
25 Operations, Inc. v. One Seventy Assocs., 896 P.2d 1012, 1016 (Kan. 1995). Additionally, the party
26 seeking to pierce the corporate veil must show that “allowing the legal fiction of separateness of the
corporate structures results in an injustice. The corporate entity may be disregarded where it is used
as a mere subterfuge, as an implement for fraud or illegality, or to work an injustice, or where
necessary to achieve equity.” Id. at 1020.

1 781 F. Supp. 1079, 1085 n.10 (E.D. Pa. 1992).

2 For example, where a Japanese parent company was engaged in the manufacture
3 of watches, its subsidiaries that acted as its sole sales agents in America were “almost by
4 definition . . . doing for their parent what their parent would otherwise have to do on its
5 own.” Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1342
6 (E.D.N.Y. 1981). The Bulova court thus attributed the subsidiaries’ contacts to the parent
7 company. Id.; see also Chan, 39 F.3d at 1405-06 (remanding to the district court for
8 additional findings of fact regarding agency where the German parent corporation owned
9 and operated cruise ships and its local subsidiary marketed cruises and chartered cruise
10 ships and sold the cruise ticket to the plaintiffs out of which the claims arose); Modesto City
11 Schs. v. Riso Kagaku Corp., 157 F. Supp. 2d 1128, 1135 (E.D. Cal. 2001) (holding
12 subsidiary was parent’s agent for personal jurisdiction purposes where subsidiary acted as
13 sole conduit for marketing and selling parent’s products in the United States).

14 In contrast, where the parent company owned a subsidiary mining company’s
15 stock but did not itself engage in the business of gold mining, imputing the subsidiary’s
16 forum contacts to the parent was not appropriate. Sonora Diamond Corp. v. Superior Court,
17 99 Cal. Rptr. 2d 824, 840-41 (Ct. App. 2000). As the Sonora Diamond court explained, had
18 the parent company owned “the rights to the gold and used Sonora Mining as the operating
19 and marketing entity,” then perhaps general jurisdiction over the parent company would be
20 appropriate because under those circumstances the parent company “could not reap the
21 benefits of its rights unless it or someone else removed and sold the ore.” Id. But where
22 the parent simply held the mining company as an investment, the subsidiary’s forum-related
23 contacts could not be imputed to the parent company. Id.

24 Likewise, in Doe, the Ninth Circuit concluded a foreign company’s subsidiaries
25 were not its general agents in California because the plaintiffs presented no evidence that in
26 the absence of the California subsidiaries’ involvement in petrochemical and chemical

1 operations, the parent would have conducted and controlled those operations. Doe, 248
2 F.3d at 929. The Court reached this conclusion even though the parent company issued
3 consolidated reporting, referred to a subsidiary in an annual report as its “US unit,” and
4 stated that use of the subsidiary “would enable it to expand its marketing network and
5 produce higher value-added specialty products in the United States.” Id.

6 **III. CMS CORPORATION**

7 CMS Energy Corporation (“CMS”) is a Michigan corporation with its principal
8 place of business in Jackson, Michigan. (Joint Supplemental Mem. of Defs. CMS Energy
9 Corp., Duke Energy Carolinas, LLC, & Reliant Energy, Inc. in Supp. of Mots. to Dismiss
10 for Lack of Pers. Juris. (Doc. #963), The CMS Defendants’ App. of Facts in Supp. of the
11 Joint Mot. to Dismiss for Lack of Pers. Juris. [“Sep. CMS App.”], Ex. A at 1.) CMS
12 conducts no business and has never been qualified to do business in Kansas. (Id.) CMS has
13 no office, mailing address, telephone number, bank account, or property in Kansas. (Id.) It
14 has no employees in Kansas, has never paid taxes there, and has never directly advertised to
15 Kansas residents. (Id.)

16 CMS does not itself engage in natural gas trading, production, sales, purchases,
17 distribution, or transportation. (Id. at 1-2.) CMS also does not report or publish natural gas
18 trade information to any trade publication. (Id.) Rather, CMS is a holding company that
19 owns subsidiaries operating in various sectors of the power and energy industries, two of
20 which engage in natural gas trading and price reporting. (Id. at 1-2, Ex. B at 1.) One such
21 indirect subsidiary is CMS Marketing, Services and Trading Company (“MST”), a
22 Michigan corporation, that changed its name to CMS Energy Resource Management
23 Company in 2004. (Sep. CMS App., Ex. A at 2-3.) MST is a subsidiary of CMS
24 Enterprises Company, a wholly owned subsidiary of CMS. (App. to Pls.’ Joint Opp’n to
25 CMS’s Renewed Mot. to Dismiss for Lack of Pers. Juris (Doc. #1081) [“Pls.’ CMS App.”],
26 Ex. B at 2.) The other is CMS Field Services, Inc. (“Field Services”), a Michigan

1 corporation with its principal place of business in Oklahoma. (Sep. CMS App., Ex. A at 3.)
2 In July 2003, Cantera Natural Gas, LLC purchased Field Services. (Id. at 4.) While CMS
3 owned it, Field Services was a wholly owned subsidiary of CMS Gas Transmission
4 Company, which is a wholly owned subsidiary of CMS Enterprises Company, a wholly
5 owned subsidiary of CMS. (Pls.' CMS App., Ex. B at 2-3.)

6 CMS shared at least one officer or director position with MST and Field
7 Services. For example, MST's President and Chief Operating Officer from 1999 to 2001
8 was a CMS officer. (Pls.' CMS App., Ex. D at CMS-KS-001858.) Field Services'
9 President from 1998 to 2001 also was a CMS officer. (Id.) MST, Field Services, and CMS
10 maintain separate bank accounts and separate books and records, however, CMS reports
11 Field Services' and MST's operations on CMS's consolidated financial reports. (Sep. CMS
12 App., Ex. A at 2-4.) CMS's primary source of cash is dividends and other distributions
13 from its subsidiaries. (Pls.' CMS App., Ex. A at CMS-KS-003534.) CMS did not make
14 financial guarantees on its subsidiaries' behalf, but CMS's wholly owned subsidiary, CMS
15 Enterprises Company, did. (Sep. Vol. of Evid. in Supp. of the CMS Defs.' App. of Facts in
16 Supp. of the Joint Mot. to Dismiss for Lack of Pers. Juris. ["CMS Sep. Vol. Evid."] (Doc.
17 #976), Ex. 2 at 141; Pls.' CMS App., Ex. A at CMS-KS-003544, Ex. E at CMS-KS-002106,
18 Ex. G at CMS-KS-001130, CMS-KS-001146.)

19 CMS entered into Service and Management Agreements with Field Services and
20 MST under which CMS agreed to provide various services, including general
21 administrative services, accounting, statistical and financial, risk management, tax, internal
22 auditing, information management, legal communications, engineering, public affairs, and
23 human resources services. (App. of Docs. Filed Under Seal (Doc. #1142) ["Ex. M"], Ex.
24 M, Service and Management Agreement.) Pursuant to these agreements, Field Services and
25 MST appointed CMS as their "managing agent . . . to manage and direct the business" of
26 Field Services and MST "subject to the general supervision and control of the Board of

1 Directors and officers” of Field Services and MST, respectively. (Id. at 5.)

2 CMS’s powers under the agreements include establishing corporate policies and
3 procedures with respect to all operations except those specifically excluded by the
4 agreement, including making tax and regulatory filings; opening and closing bank accounts;
5 purchasing and maintaining insurance; buying, selling, leasing or encumbering assets;
6 employing, laying off, or dismissing employees; and conducting litigation. (Id. at 5-6.) The
7 agreements precluded CMS from engaging in certain activities, such as selling, leasing or
8 otherwise disposing of all of Field Services’ or MST’s assets; incurring indebtedness other
9 than indebtedness to trade creditors in the ordinary course of business; forming partnerships
10 or joint ventures; or taking any other “extraordinary corporate action,” without prior
11 approval of Field Services’ or MST’s boards of directors. (Id. at 8.) In exchange, Field
12 Services and MST paid CMS an annual consulting fee and reimbursed CMS for direct
13 expenses. (Id. at 9.)

14 In addition to the Service Agreements, CMS entered into Royalty and Licensing
15 Agreements with Field Services and MST pursuant to which Field Services and MST could
16 use the CMS Energy trade name and service marks. (Ex. M, Royalty and Licensing
17 Agreement.) In return, Field Services and MST agreed to pay a royalty fee. (Id. at 3, C-1.)

18 In its 1999 annual report, CMS described itself as--

19 a leading international integrated energy company acquiring,
20 developing and operating energy facilities and providing energy
21 services in major growth markets. CMS Energy provides a complete
22 range of international energy expertise from energy production to
consumption. CMS Energy intends to pursue its global growth by
making energy investments that provide expansion opportunities for
multiple CMS Energy businesses.

23 (Pls.’ CMS App., Ex. C at CMS-KS-001006.) Similarly, in its 2000 annual report, CMS
24 described itself as “an integrated energy company with a strong asset base enhanced by an
25 active marketing services and trading capability.” (Pls.’ CMS App., Ex. D at CMS-KS-
26 001795.) CMS has stated that its “vision” was to be “an integrated energy company with a

1 strong asset base, supplemented with an active marketing, services and trading capability.”
2 (Pls.’ CMS App., Ex. E at CMS-KS-002109.)

3 Additionally, CMS has stated that it “intends to integrate the skills and assets of
4 its business units to obtain optimal returns and to provide expansion opportunities.” (Id.;
5 see also Pls.’ CMS App., Ex. C at CMS-KS-001006 (stating CMS “intends to use its
6 marketing, services and trading business to improve the return on CMS Energy’s other
7 business assets”).) In a 2001 filing with the Securities and Exchange Commission (“SEC”),
8 CMS stated that it “intends to use CMS MST to focus on wholesale customers such as
9 municipals, cooperative electric companies and industrial and commercial customers.”
10 (Pls.’ CMS App., Ex. E at CMS-KS-002072.) CMS also stated that it, “through its
11 subsidiary CMS MST, engages in trading activities.” (Id. at CMS-KS-002162.)

12 In its 2000 annual report, CMS identifies certain market risks to which it is
13 exposed including “interest rates, currency exchange rates, and certain commodity and
14 equity security prices.” (Pls.’ CMS App., Ex. D at CMS-KS-001874.) In response to these
15 risks, CMS has implemented an “enterprise-wide” risk management policy. (Id.) The
16 policy is implemented by CMS’s Risk Committee which “review[s] the corporate
17 commodity position and ensure[s] that net corporate exposures are within the economic risk
18 tolerance levels established by the Board of Directors.” (Id.) The Risk Committee is
19 comprised of CMS business unit managers and is chaired by CMS’s Chief Risk Officer.
20 (Pls.’ CMS App., Ex. E at CMS-KS-002107.)

21 CMS controls commodity-related risk primarily through its Risk Management
22 Policy. (Ex. M, CMS Energy Risk Management Policy.) CMS’s Board of Directors has
23 “ultimate authority” over the Risk Management Policy. (Id. at 6.) Determination of the
24 “levels and types of risk” CMS will accept lies within the Executive Oversight Committee’s
25 authority. (Id.) The Executive Oversight Committee consists of CMS’s Chief Executive
26 Officer, President and Chief Operating Officer, and Senior Vice President and Chief

1 Financial Officer. (Id. at 3.) MST's President has the responsibility of "authoriz[ing] the
2 individuals within [MST] responsible for executing derivative transactions on its behalf and
3 on behalf of CMS Energy and . . . establish[ing] appropriate trading limits for said
4 individuals." (Id.) These limits are subject to approval by the CMS Risk Committee. (Id.)
5 The Risk Committee is comprised of CMS's Senior Vice President and Chief Financial
6 Officer, the president of each business unit, CMS's Vice President of Risk Management,
7 and other individuals representing departments with certain transactional authority. (Id. at
8 4.)

9 The Risk Management Policy assigns to each business unit an amount of dollars
10 the Risk Committee has authorized to be at risk known as "VaR." (Id. at 12.) VaR is "the
11 total dollars that the business unit could expect to lose, in one day's time, if energy
12 commodity prices move in a magnitude equal to historical observations against the business
13 unit." (Id.) Each business unit must monitor and report its operations to the Risk
14 Management Group to ensure it does not exceed its allotted VaR. (Id.) The Risk
15 Management Group consists of certain individuals within CMS Enterprises Company
16 responsible for collecting and reporting all of CMS's business units' books into a single
17 portfolio. (Id. at 4.) The business unit must take action to correct violations of this limit
18 within one or two days or the Risk Management Group will provide notice to the Executive
19 Oversight Committee, which notifies the Authorized Trading Group of what action must be
20 taken to correct the violation. (Id. at 12.) The Authorized Trading Group is the "entity
21 within CMS Energy authorized to negotiate for and enter into derivative agreements" on
22 CMS's behalf. (Id. at 2.) The Risk Management Policy assigns this responsibility to MST.
23 (Id.)

24 The Risk Management Policy contains similar constraints for earnings at risk for
25 each business unit as well as limits designed to minimize the total financial loss CMS or its
26 business units may incur. (Id. at 13.) Should those limits be reached, "all activity related to

1 that transaction, book of transactions or the business unit entering into said transaction shall
2 immediately cease and no new transactions will be entered into unless specifically
3 authorized by the [Executive Oversight Committee].” (Id.) The business unit may not
4 resume business activity until authorized by the Executive Oversight Committee. (Id.)

5 The Executive Oversight Committee establishes that portion of CMS’s earnings
6 which may be exposed to energy commodity risk. (Id. at 18.) The Risk Committee then
7 allocates this limit across the various business units. (Id.) Should CMS’s earnings at risk
8 exceed the set amount, the Risk Management Group “immediately” notifies the Authorized
9 Trading Group, the Risk Committee, and the Executive Oversight Committee. (Id. at 20.)
10 Within twenty-four hours, the Risk Management Group and the Authorized Trading Group
11 must recommend actions to correct the situation. (Id.) Within forty-eight hours of
12 receiving the recommendation, the Executive Oversight Committee directs the Risk
13 Management Group and Authorized Trading Group of what actions to take. (Id.) While
14 CMS set overall limits, each subsidiary “operate[s] their businesses how they see fit within
15 those parameters.” (CMS Sep. Vol. Evid., Ex. 2 at 113.)

16 The Risk Management Policy requires each business unit to create its own
17 aggregate risk reports on a daily basis. (Ex. M, Risk Management Policy at 6, 12.) These
18 reports are provided to the head of the business unit and CMS’s Vice President for Risk
19 Management. (Id.) Under the policy, CMS was to perform an audit at least annually to
20 ensure compliance. (Id. at 14.) Violations of the policy are grounds for terminating an
21 employee. (Id. at 17.) In 2001 and 2002, CMS “identified a number of deficiencies in
22 MST’s systems of internal accounting controls.” (Pls.’ CMS App., Ex. A at CMS-KS-
23 003560.) In response, CMS senior management and the CMS Audit Committee responded
24 by replacing some personnel, deploying additional accounting personnel, and implementing
25 changes to MST’s internal accounting controls. (Id.)

26 ///

1 In filings with the SEC, CMS disclosed that it had notified appropriate
2 governmental authorities “that some employees at CMS MST and CMS Field Services
3 appeared to have provided inaccurate information regarding natural gas trades to various
4 energy industry publications which compile and report index prices. CMS Energy is
5 cooperating with investigations by the Commodity Futures Trading Commission,
6 Department of Justice and [the Federal Energy Regulatory Commission] regarding this
7 matter.” (Id.) In 2005 filings with the SEC, CMS indicated that MST engaged in “round-
8 trip trading transactions (simultaneous, prearranged commodity trading transactions in
9 which energy commodities were sold and repurchased at the same price),” and the
10 Department of Justice was investigating CMS. (Pls.’ CMS App., Ex. I at CMS-KS-
11 010797.) CMS also disclosed that, pursuant to existing indemnification policies, it was
12 advancing legal defense costs to two former Field Services employees in a civil injunction
13 action filed by the Commodity Futures Trading Commission (“CFTC”). (Id. at CMS-KS-
14 010798.)

15 In November 2003, MST and Field Services entered into a settlement with the
16 CFTC. (Pls.’ CMS App., Ex. B.) The CFTC found that from November 2000 through
17 September 2002, MST and Field Services reported false natural gas trade information to
18 price and volume reporting firms. (Id. at 2-3.) Under the settlement, MST and Field
19 Services agreed to cease and desist from further violations and to pay a \$16 million penalty.
20 (Id. at 5.) Additionally, MST, Field Services, CMS, and Cantera Natural Gas, Inc. agreed to
21 cooperate with the investigation, by, among other things, preserving records, fully
22 complying with inquiries or requests for records, producing witnesses, and assisting in
23 locating prior employees. (Id. at 6-7.) CMS, MST, and Field Services also agreed not to
24 make any public statement denying the CFTC’s findings. (Id. at 7.)

25 By October 2002, Field Services ceased submitting natural gas price reports to
26 trade publications. (Sep. CMS App., Ex. C at 5.) In January 2003, MST sold a major

1 portion of its wholesale natural gas trading book to a third party. (Pls.' CMS App., Ex. A at
2 CMS-KS-003478.) By 2003, CMS had "eliminated virtually all of the business of [MST]." (Pls.' CMS App., Ex. J at CMS-KS-008608.) After that time, MST's remaining business
3 "focuses on buying the fuel needed by [CMS's] domestic independent power plants and
4 selling the uncontracted energy they produce." (Id.)

5
6 Plaintiffs do not contend this Court may assert personal jurisdiction over CMS
7 based on CMS's own contacts with Kansas. (Pls.' Joint Opp'n to CMS Energy
8 Corporation's Mot. to Dismiss for Lack of Pers. Juris. (Doc. #1080) at 4-5.) Consequently,
9 CMS is subject to personal jurisdiction in Kansas only if the forum acts of its subsidiaries,
10 Field Services and/or MST, are attributable to it through alter ego or agency principles.⁴

11 **A. Alter Ego**

12 Plaintiffs have failed to establish a prima facie case of personal jurisdiction based
13 on MST or Field Services being CMS's alter ego. CMS indirectly wholly owns both
14 subsidiaries. The companies did not share offices and had only one overlapping officer or
15 director. CMS did not make financial guarantees on MST's or Field Services' behalf. The
16 companies maintained separate books and records. Although MST and Field Services were
17 permitted to use the CMS trade name and service marks, they had to pay a royalty fee to do
18 so.

19 Under the Services and Management Agreements, CMS provided corporate
20 services to MST and Field Services and acted as the subsidiaries' managing agent.
21 However, MST and Field Services contractually were required to pay for those services,
22 and CMS's activities were subject to the control of the subsidiaries' boards of directors.
23 The Services and Management Agreements set forth certain actions CMS could not
24 undertake as managing agent without the prior written approval of the subsidiaries' boards

25
26 ⁴ The Court will assume that if Field Services' and/or MST's forum-related acts are attributable to CMS, the Kansas long-arm statute is satisfied.

1 of directors. Such restrictions are inconsistent with alter ego status.

2 CMS's promulgation of general policies for its subsidiaries is consistent with its
3 indirect investor status. CMS, as an investor up the corporate chain, is entitled to monitor
4 Field Services' and MST's performance and limit the risk to its investment that it is willing
5 to accept. Consequently, any daily reporting of information from Field Services and MST
6 to CMS is in accord with CMS's investor oversight role. No evidence suggests CMS gave
7 daily control commands to Field Services or MST. Rather, the record demonstrates that,
8 consistent with its investor status, CMS set general policies and guidelines regarding certain
9 overall limits, such as limits on VaR and earnings at risk. Plaintiffs present no evidence
10 that CMS played a role in the day-to-day conduct of Field Services' and MST's operational
11 business. For example, with respect to natural gas trading, while CMS set overall limits on
12 certain metrics, CMS had no role in making the day-to-day decisions of who Field Services
13 or MST was to trade with, when, for what amount of natural gas, and at what price.
14 Although the Risk Management Policy permitted CMS to cease any subsidiary business
15 activity when certain limits were exceeded, Plaintiffs present no evidence CMS ever did so,
16 much less that it did so on a daily basis with respect to Field Services and MST. Plaintiffs
17 also present no evidence CMS had any role in Field Services' or MST's price reporting to
18 indices.

19 Even if Plaintiffs had established a lack of corporate separateness, Plaintiffs have
20 not established a fraud or injustice would result if the Court failed to pierce the corporate
21 veil. Plaintiffs contend it would be unjust to permit CMS to reap the benefits of Field
22 Services' and MST's alleged unlawful behavior by enjoying profits from its indirect
23 subsidiaries' trading activities while escaping liability for their alleged misconduct.
24 However, the alleged illegal price manipulation cannot itself constitute the fraud or injustice
25 necessary to pierce the corporate veil. Rather, CMS must have had some fraudulent intent
26 at Field Services' or MST's inception or some later abuse of the corporate form such that

1 failing to treat the entities as one would be inequitable. Plaintiffs present no evidence Field
2 Services or MST was undercapitalized at its inception. Further, the fact that the two
3 companies operated as legitimate businesses for years suggests a lack of fraudulent intent or
4 perpetration of a fraud through use of the corporate structure on the parent's part.

5 Plaintiffs' fear that they may not be able to collect on a judgment in this action
6 against Field Services or MST does not constitute fraud or injustice to support piercing the
7 corporate veil. The Court therefore finds Plaintiffs have not met their burden of
8 establishing Field Services or MST is CMS's alter ego, and the Court will not attribute
9 these subsidiaries' contacts with Kansas to CMS for purposes of determining personal
10 jurisdiction based on alter ego principles.

11 **B. Agency**

12 Plaintiffs have failed to establish a prima facie case that Field Services or MST
13 was CMS's general agent in Kansas. CMS's business is not purely a holding company in
14 the sense that it does not passively hold stock in companies from an unrelated range of
15 businesses. CMS describes itself as an integrated energy company and has referred to the
16 synergistic benefits of its trading business line with the business lines of other subsidiaries it
17 owns.

18 Although CMS identifies natural gas trading and marketing as one of its business
19 segments, Plaintiffs have not established that Field Services' or MST's sales of natural gas
20 in Kansas were sufficiently important to CMS that if Field Services or MST did not make
21 the sales in Kansas, CMS would have done so itself. CMS did not conduct any operational
22 business itself. Natural gas trading activity was a separate business segment operated
23 through an indirect subsidiary. Further, CMS subsequently sold Field Services, and MST
24 ceased natural gas trading and reporting, suggesting that these subsidiaries' trading
25 activities were not sufficiently important to CMS that it would perform the activities itself if
26 its indirect subsidiaries did not do so on its behalf.

Moreover, Plaintiffs have presented no evidence that Field Services' and MST's natural gas sales in Kansas in particular were sufficiently important to CMS's business that CMS would have performed the sales in Kansas itself absent its subsidiaries' representation in the forum. See Modesto City Schs., 157 F. Supp. 2d at 1135 (noting twenty percent of parent's products were sold through subsidiary which acted as parent's "sole conduit for marketing and selling its products in the United States"); Bulova Watch Co., Inc., 508 F. Supp. at 1344 (noting that sixty percent of parent's products were sold as exports and the United States was the parent company's largest export market through its New York subsidiaries' sales in the United States). Consequently, Plaintiffs have not shown that Field Services' or MST's Kansas natural gas sales played a significant role in CMS's "organizational life" such that it acted as a substitute for CMS in the forum. Bulova Watch Co., Inc., 508 F. Supp. at 1344. The Court therefore will not attribute Field Services' and MST's Kansas contacts to CMS under agency principles.⁵

⁵ The result would be the same under general Kansas agency law. In Kansas, an agent has express authority if "the principal has delegated authority to the agent by words which expressly authorize the agent to do a delegable act." Mohr v. State Bank of Stanley, 734 P.2d 1071, 1075 (Kan. 1987) (quotation omitted). An agent has implied authority if "from the facts and circumstances of the particular case, it appears there was an implied intention to create an agency; in which event, the relation may be held to exist, notwithstanding either a denial by the alleged principal or whether the parties understood it to be an agency." Id. (quotation omitted). Where an agent lacks actual authority, either express or implied, an agent may possess apparent or "ostensible" agency. Town Ctr. Shopping Ctr., LLC v. Premier Mortg. Funding, Inc., 148 P.3d 565, 569 (Kan. Ct. App. 2006). "An ostensible or apparent agency may exist if a principal has intentionally or by want of ordinary care induced and permitted third persons to believe a person is his or her agent even though no authority, either express or implied, has been actually conferred upon the agent." Id. (quotation omitted). To determine whether an agent had apparent authority, the court considers the principal's intentional acts or words to a third party and whether those acts or words "reasonably induced the third party to believe that an agency relationship existed." Id. (citing Mohr, 734 P.2d at 1076).

Here, Plaintiffs have presented evidence that CMS delegated to MST the authority to conduct derivative trading on CMS's behalf under the Risk Management Policy. However, Plaintiffs have presented no evidence MST engaged in derivative transactions in Kansas pursuant to this authority. Additionally, Plaintiffs have presented a comment in an SEC filing that CMS engages in trading activity "through" MST. The statement is not an express authorization for MST to sell natural gas on CMS's behalf as CMS's agent with authority to bind CMS. Rather, it describes CMS's business line

1 The Court will not attribute Field Services' or MST's contacts with the forum to
 2 CMS, and CMS has no contacts of its own sufficient to support personal jurisdiction. The
 3 Court therefore will grant CMS's motion to dismiss for lack of personal jurisdiction.

4 **IV. DUKE ENERGY CAROLINAS, LLC**

5 Duke Energy Carolinas, LLC ("DEC") is a North Carolina limited liability
 6 company formerly known as Duke Energy Corporation, a North Carolina corporation.
 7 (Joint Supplemental Mem. of Defs. CMS Energy Corp., Duke Energy Carolinas, LLC, &
 8 Reliant Energy, Inc. in Supp. of Mots. to Dismiss for Lack of Pers. Juris. (Doc. #963),
 9 Separate App. of Facts Regarding Duke Energy Carolinas, LLC ["Sep. DEC App."], Ex. A
 10 at 1.) Duke Energy Corporation converted to a limited liability company and renamed itself
 11 DEC in April 2006. (Renewed Mot. to Dismiss for Lack of Pers. Juris. (Doc. #872) ["DEC
 12 Mot."], Ex. A at 2.) DEC primarily engages in the business of generating, transmitting,
 13 distributing, and selling electric energy in North and South Carolina. (Id. at 3.)

14 DEC does not maintain offices, conduct business, own property, or maintain a
 15 bank account in Kansas. (Sep. DEC App., Ex. A at 2, Ex. C at 2, Ex. D at 2.) DEC has not
 16 applied for or received a certificate of authority to transact business in Kansas and has no
 17 registered agent for service of process in Kansas. (Sep. DEC App., Ex. B at 2.)

18 DEC wholly owns Duke Capital Corporation, which in turn wholly owns Pan
 19 Energy Corp. (App. to Pls.' Joint Opp'n to Duke Energy Carolinas, LLC's Mot. to Dismiss
 20 for Lack of Pers. Juris. (Doc. #1084) ["Pls.' DEC App."], Ex. F.) Pan Energy Corp. wholly
 21 owns Duke Energy Services, Inc., which wholly owns Duke Energy Natural Gas
 22 Corporation. (Id.) Duke Energy Natural Gas Corporation wholly owns DETMI

23 _____
 24 operationally conducted through its subsidiary. Plaintiffs present no other evidence that CMS
 25 expressly delegated trading authority on CMS's behalf to MST. As to apparent agency, Plaintiffs have
 26 presented evidence that CMS permitted Field Services and MST to use the "CMS" name and logo in
 marketing natural gas in Kansas. However, Plaintiffs have presented no evidence that anyone relied
 on an apparent agency relationship between CMS and Field Services or MST.

1 Management, Inc. (Id.) DETMI Management, Inc. owns a sixty percent interest in Duke
2 Energy Trade and Marketing, LLC (“DETM”), a Defendant in this action and the subsidiary
3 whose contacts with Kansas Plaintiffs seek to attribute to DEC. (DEC Mot., Ex. C at 2.)
4 Mobil Natural Gas, Inc. (“MNGI”), an indirect subsidiary of Exxon Mobil Corporation,
5 owns the other forty percent of DETM. (Id. at 2-3.)

6 DETM was created in 1996 as a Delaware limited liability company pursuant to a
7 limited liability company agreement and limited partnership agreement. (Pls.’ DEC App.,
8 Ex. E at 34-35; App. of Docs. Filed Under Seal (Doc. #1125) [“Sealed DEC App.”], Ex. L
9 at DEMDL000383; DEC Separate Vol. of Evid. in Supp. of the Separate App. of Facts
10 Regarding Duke Energy Carolinas, LCC (Doc. #968) [“DEC Separate Vol. Evid.”], Ex. 7.)
11 The company now known as DETM originally was called PanEnergy Trading and
12 Marketing Services, LLC, and was created by an agreement between PTMSI Management,
13 Inc. and MNGI. (DEC Separate Vol. Evid., Ex. 7 at 1, 6, 7, 10.) PTMSI Management,
14 Inc.’s parent company at the time was PanEnergy Corp. (Id. at 7, 10.) PanEnergy Corp.
15 was acquired by Duke Energy Corporation in 1997 and PanEnergy Trading and Marketing
16 Services, LLC was renamed to DETM. (DEC Separate Vol. Evid., Ex. 9 at 2.) DETM is
17 engaged in the purchase and sale of natural gas and electricity at wholesale. (DEC Mot.,
18 Ex. C at 3.) DETM concedes personal jurisdiction in this action. (Pls.’ DEC App., Ex. A at
19 2.)

20 DETM is run by a Management Committee consisting of three representatives
21 from the Duke Energy side and two representatives from the Exxon Mobil side. (Sealed
22 DEC App., Ex. L at DEMDL000400.) The Management Committee acts through the
23 delegation of certain responsibilities and authority to the managing member, which in 2001
24 and 2002 was DETMI Management, Inc. (Id.) Although DETMI Management, Inc. was
25 the managing member, and through its majority status on the committee could outvote the
26 MNGI members on certain matters, the limited liability company agreement mandated that

1 some actions required unanimous approval by the Management Committee. (DEC Separate
2 Vol. Evid., Ex. 7 at 17, 24, 26-27.) In at least one instance, the MNGI members refused to
3 agree to a business plan supported by the DETMI Management, Inc. members. (Pls.' DEC
4 App., Ex. E at 67-69.)

5 No DEC director serves as an officer or director for DETM. (DEC Mot., Ex. A
6 at 4.) In DEC's 2000 annual report, DEC identified a "management team" which includes
7 Jim W. Mogg ("Mogg"), Chief Executive Officer of Duke Energy Field Services; Kirk B.
8 Michael ("Michael"), Vice President and Chief Financial Officer for Finance and Planning;
9 James Donnell ("Donnell"), President and Chief Executive Officer for Duke Energy North
10 America; and Ronald Green ("Green"), President and Chief Executive Officer for
11 Duke/Fluor Daniel. (Pls.' DEC App., Ex. B at DEMDL001901.) Mogg, Michael, Donnell,
12 and Green were members of the DETM Management Committee at one point or another.
13 (Sealed DEC App., Ex. L at DEMDL001702, DEMDL001706, DEMDL001711.)

14 DEC and DETM maintain separate corporate records. (DEC Mot., Ex. A at 4.)
15 DEC provided corporate services to DETM, including administering employee health
16 insurance, human resources, computer technology, legal services, and credit risk
17 management. (Pls.' DEC App., Ex. A at 4-5.) Throughout the relevant time period, DETM
18 regularly used, and was permitted to use, the "Duke Energy" and "Mobil" logos. (Id. at 5.)
19 DETM did not have any agency agreements or power of attorney for DEC, and did not
20 register to do business on DEC's behalf in Kansas during the relevant time period. (Id.)

21 DETM was financed through a \$150 million funding facility, of which DETMI
22 Management, Inc. provided sixty percent and MNGI funded the other forty percent. (DEC
23 Separate Vol. Evid., Ex. 3 at 35.) In DETM's financial statements, it twice indicated that
24 DEC was responsible for providing operational interest-free contributions, on a
25 proportionate basis with Exxon Mobil, to fund DETM's operations. (Sealed DEC App., Ex.
26 L at DEMDL00383, DEMDL00400.) According to Richard McGee ("McGee"), former

1 general counsel for energy services for DEC and current president of DEC's international
2 business, these statements were a mistake, as PanEnergy Corp., not DEC, is responsible for
3 making contributions under the funding facility agreement. (Pls.' DEC App., Ex. E at 6,
4 138-40.) DEC's consolidated financial reports reflected sixty percent of DETM's profits
5 and losses during the relevant time period. (Pls.' DEC App., Ex A at 6.)

6 DEC describes itself, collectively with its subsidiaries, as "an integrated energy
7 and energy services provider with the ability to offer physical delivery and management of
8 both electricity and natural gas throughout the U.S. and abroad." (Pls.' DEC App., Ex. B at
9 DEMDL001846.) DEC provides these services through various "business segments," one
10 of which includes DETM's natural gas trading. (Id.) DEC describes its business strategy as
11 "develop[ing] integrated energy businesses in targeted regions where Duke Energy's
12 extensive capabilities in developing energy assets, operating electricity, natural gas and
13 NGL plants, optimizing commercial operations and managing risk can provide
14 comprehensive energy solutions for customers and create superior value for shareholders."
15 (Id.)

16 DEC has created "[c]omprehensive risk management polices" to monitor and
17 manage market, commodity price, credit, and other risks to which DEC and its subsidiaries
18 are exposed. (Id. at DEMDL001854-55.) As part of its risk management policies, DEC
19 monitors certain metrics, such as value-at risk ("VAR") and daily earnings at risk ("DER")
20 on a daily basis. (Id. at DEMDL001855.) DEC has several committees which perform risk
21 management, including the Corporate Risk Management Committee, the Energy Risk
22 Management Committee, and the Financial Risk Management Committee. (Pls.' DEC
23 App., Ex. E at 80.) DEC appointed the members of each of these committees. (Id.)
24 Through these polices and committees, DEC sets overall risk guidelines for its subsidiaries.

25 For example, DEC adopted a Code of Business Ethics which applied to every
26 DEC subsidiary. (Pls.' DEC App., Ex. J, Ex. E at 100-01.) This policy mandated

1 compliance with applicable antitrust laws. (Pls.' DEC App., Ex. J at 12.) This policy was
2 implemented and supervised by DEC's Corporate Compliance Committee. (Id. at 15.) The
3 Corporate Compliance Committee was responsible for updating the code, establishing
4 education programs for employees about ethics and compliance issues, providing guidance
5 under the code, monitoring and auditing compliance, reporting periodically to management
6 and the Audit Committee of DEC's Board of Directors, and reporting violations to the
7 appropriate governmental authorities. (Id.) DETM either incorporated this policy by
8 reference or adopted a similar policy. (Pls.' DEC App., Ex. E at 115-16.)

9 DEC also has a Corporate Credit Risk policy. (Sealed DEC App., Ex. L at
10 DEMDL001382, DEMDL001388.) Under this policy, DEC's Chief Risk Officer chairs the
11 Risk Management Committee. (Id.) The Risk Management Committee meets at least
12 monthly and is responsible for reviewing business trends and credit exposure, monitoring
13 compliance with the policy, identifying where new policies are needed, and ensuring
14 "consistent and mutually reinforcing credit and market risk management strategies through
15 various corporate risk policies and associated guidelines for implementing policy." (Id.)
16 The policy also sets forth the duties of the Chief Credit Officer, which includes the ability
17 to "stop business activity that would increase credit exposure, as is necessary, to protect
18 Duke Energy's balance sheet." (Id.) The Chief Credit Officer reports to the Chief Risk
19 Officer. (Id.)

20 DEC has a Corporate Risk Management Committee consisting of DEC's chief
21 financial officer and DEC Policy Committee members. (Id. at DEMDL001488.) This
22 Committee establishes "comprehensive risk management policies to monitor and control
23 identified risks." (Id.) DEC's Corporate Risk Management Committee delegates some
24 responsibilities to the Energy Risk Management Committee and the Financial Risk
25 Management Committee, but retains oversight responsibilities. (Id.) The Energy Risk
26 Management Committee has responsibility for overseeing energy risk management

1 practices and recommending energy commodity exposure limits, subject to approval by the
2 Corporate Risk Management Committee. (Id.) The Financial Risk Management
3 Committee is responsible for managing risks related to interest rates, foreign currency, and
4 credit. (Id.)

5 Within DETM, “[u]ltimate risk control responsibility resides with the DETM
6 Management Committee.” (Id. at DEMDL001489.) The DETM Management Committee
7 oversees the risk management and control function and approves policies and controls for
8 DETM. For example, DETM adopted its own Risk Management and Trading Policies and
9 Controls. (Id. at DEMDL001484.) DETM’s Management Committee “delegates the day-
10 to-day overview of the risk management and control function” to the DEC Energy Risk
11 Management Committee. (Id. at DEMDL001489.) “However, overall responsibility for
12 DETM’s performance targets, business plans and approved risk levels remains with the
13 Management Committee.” (Id.) Although DETM’s Risk Management and Trading
14 Policies and Controls states that the Management Committee delegates “day-to-day
15 overview” to the DEC Energy Risk Management Committee, it describes the Energy Risk
16 Management Committee’s functions as meeting “at least monthly” to establish risk
17 management policies, controls, and practices, and overseeing and approving excesses of
18 overall limits. (Id. at DEMDL001489-90.) When it comes to operational control, the policy
19 vests that authority in DETM Senior Management. (Id. at DEMDL001490.) DETM Senior
20 Management is responsible for “[d]evelopment of trading strategies; [a]ctive management
21 of trading within overall limits; [a]llocation of limits to traders and/or books; [e]nforcing
22 the risk control environment; [a]dvocating new limits and products; and [a]dvocating
23 exceptions or revisions to policy when appropriate.” (Id.) Beneath DETM Senior
24 Management, the origination and trading groups actually conduct the transactions with
25 customers. (Id.)

26 ///

1 DEC's Energy Risk Management Committee is not responsible for managing
2 energy price risk for DETM. (DEC Separate Vol. Evid., Ex. 10 at DEMDL001569.)
3 Instead, DETM manages its own energy price risk pursuant to its own risk management
4 policy. (Id.) However, that policy is subject to approval by the Corporate Risk
5 Management Committee. (Id.) In similar fashion, DETM decides whether to extend credit,
6 subject to the Financial Risk Committee's Credit Quality Guidelines. (Id. at
7 DEMDL001495.) According to McGee, DEC's risk management policies "would have
8 applied to DETM only to the extent that . . . the management committee of DETM had
9 adopted a policy that was similar to this or [DETM], in discharging its responsibilities as a
10 managing member of DETM . . . adopt[ed] policies that it saw fit in connection with
11 discharging those duties." (Pls.' DEC App., Ex. E at 100.) These policies "were either
12 largely consistent with or in some cases maybe identical to some of" DEC's policies. (Id.)

13 At a July 2000 DETM management committee meeting, the MNGI representative
14 expressed some concern that certain personnel now working for DETM would be shared
15 between DETM and Duke Energy North America, LLC. (Sealed DEC App., Ex. L at
16 DEMDL001707.) Specifically, the MNGI representative was concerned that because
17 DETM senior managers "would have dual responsibilities, working for both DETM and
18 Duke Energy or Duke affiliates, [they] would face conflicts because their compensation is
19 based on performance of two entities with differing Duke ownership shares." (Id.) At a
20 September 2001 DETM management committee meeting, the Exxon Mobil representative
21 "objected to the way the business had been run including a perceived lack of separation
22 between [Duke Energy North America] and DETMI." (Id. at DEMDL001718.)

23 In May 2002, DETM's outside auditor, Deloitte & Touche, sent a letter to the
24 DETM management committee highlighting certain areas of concern. (Id. at
25 DEMDL002687.) Among the concerns Deloitte & Touche highlighted was that DETM's
26 operations were "highly integrated into the overall strategy of Duke Energy North America

1 ('DENA'). There are instances where the distinctiveness between DETM and other
2 affiliates of its owners could be enhanced.”⁶ (Id. at DEMDL002692.)

3 In September 2003, the CFTC entered into a settlement with DETM regarding
4 allegations that DETM manipulated the natural gas market. (DEC Mot., Ex. F.) The CFTC
5 found that from January 2000 through August 2002, DETM’s Houston office reported to
6 price reporting firms false price and volume information regarding natural gas transactions.
7 (Id. at 2-3.) As part of the settlement, DETM agreed to cease and desist from any future
8 violations, and agreed to pay a \$28 million fine. (Id. at 5.) Additionally, both DETM and
9 Duke Energy Corporation (DEC’s predecessor) agreed to cooperate in any future
10 investigations arising out of this investigation, to preserve records, to produce documents
11 when requested, and to provide assistance in locating and contacting any prior employees.
12 (Id.) DETM and Duke Energy Corporation also agreed not to publicly deny the CFTC’s
13 findings of fact. (Id. at 6.) DEC attorneys and senior executives participated in internal
14 investigations into DETM’s price reporting activities. (Pls.’ DEC App., Ex. A at 6.)

15 In April 2003, DEC announced that two of its subsidiaries, Duke Energy North
16 America and Duke Energy Merchants, would cease proprietary trading of natural gas and
17 power. (DEC Mot., Ex. G.) DETM also ceased speculative natural gas trading in 2003.
18 (Pls.’ DEC App., Ex. A at 5.) After that time, DETM continued to buy and sell natural gas
19 “for the purpose of meeting and hedging its obligations to supply gas-fired power plants
20 owned by Duke Energy North America, Inc. and other affiliates and to meet natural gas
21 supply commitments it has made.” (Id.) By the end of 2004, DEC “made substantial
22 progress on winding down” the DETM joint venture with Exxon Mobil, and had
23 “completed or signed transactions to sell about 90 percent of that business.” (Pls.’ DEC

24
25 ⁶ DEC objects to the admission of the Deloitte & Touche letter as inadmissible hearsay.
26 Because consideration of the letter does not affect the outcome of this decision, the Court will deny
DEC’s objection.

1 App., Ex. G.)

2 Plaintiffs concede they are not contending this Court may assert personal
3 jurisdiction over DEC based on DEC's own contacts with Kansas. (Pls.' Joint Opp'n to
4 Duke Energy Carolinas, LLC's Mot. to Dismiss for Lack of Pers. Juris. (Doc. #1083) at 5.)
5 Consequently, DEC is subject to personal jurisdiction in Kansas only if the forum acts of its
6 subsidiary, DETM, are attributable to it through alter ego or agency principles.⁷

7 **A. Alter Ego**

8 Plaintiffs have failed to establish a prima facie case of personal jurisdiction based
9 on DETM being DEC's alter ego. DEC indirectly owns only sixty percent of DETM.
10 DETM thus is neither DEC's direct subsidiary nor its wholly owned subsidiary. The
11 companies did not share offices and had virtually no overlapping officers or directors. That
12 other officers and directors of other DEC subsidiaries may have overlapped or that DEC
13 identified certain DETM Management Committee members as part of an overall
14 "management team" does not indicate a lack of separateness between DEC and DETM.
15 Likewise, the fact that MNGI and/or Deloitte & Touche perceived a possible lack of
16 separateness between DETM and Duke Energy North America does not establish a lack of
17 separateness between DETM and DEC. Nor does the possibility that DEC was responsible
18 for making contributions under the funding facility or that DEC provided corporate
19 services, such as legal or human resources support.

20 Plaintiffs have presented no evidence that DEC controlled DETM's daily
21 operations. Under the limited liability company agreement, DETMI Management, Inc. was
22 the managing agent, not DEC. And as to DETMI Management, Inc., it did not have
23 complete control over DETM as the MNGI representatives' approval was required for any
24 material decisions. In at least one instance, DETMI Management, Inc. was unable to

25 ⁷ The Court will assume that if DETM's forum-related acts are attributable to DEC, the Kansas
26 long-arm statute is satisfied.

1 implement the business plan it desired because it could not obtain the approval of the
2 MNGI representatives on the Management Committee.

3 DEC's promulgation of general policies for its subsidiaries is consistent with its
4 indirect investor status. DEC, as an investor up the corporate chain, is entitled to monitor
5 DETM's performance. Consequently, any daily reporting of information from DETM to
6 DEC is in accord with DEC's investor oversight role. No evidence suggests DEC gave
7 daily control commands to DETM or even to DETMI Management, Inc. Rather, the record
8 demonstrates that, consistent with its investor status, DEC set general policies and
9 guidelines regarding best policies and practices, as well as certain overall limits, such as
10 limits on credit risk. However, DEC's broad policies applied to DETM only to the extent
11 DETM's Management Committee adopted those policies, in whole or in part, through
12 DETMI Management, Inc.'s status as a majority member.

13 Moreover, DETM's delegation of certain risk management oversight to DEC's
14 Energy Risk Management Committee does not demonstrate daily control. The Energy Risk
15 Management Committee meets "at least monthly," and is responsible for establishing risk
16 managing practices and controls, monitoring daily reports, and overseeing and approving
17 any excesses of a risk limit. (Sealed DEC App., Ex. L at DEMDL001490.) The Energy
18 Risk Management Committee thus established broad guidelines under which DETM
19 operated and became involved, if ever, only when overall limits were exceeded. Actual
20 operational decisions, such as developing trading strategy, actively managing trading within
21 overall limits, allocating limits among traders, and enforcing risk control, were the
22 responsibility of DETM Senior Management.

23 Further, with respect to DETM's day-to-day conduct of its business within these
24 guidelines, Plaintiffs present no evidence DEC had any role. For example, with respect to
25 natural gas trading, while DEC set overall limits on certain metrics, DEC had no role in
26 making the day-to-day decisions of who DETM was to trade with, when, for what amount

1 of natural gas, and at what price. Plaintiffs also present no evidence DEC had any role in
2 DETM's price reporting to indices. Plaintiffs present evidence that DEC policies granted
3 DEC's chief credit officer with veto power over any DETM business activity, but Plaintiffs
4 present no evidence that authority ever was exercised over DETM generally or particularly
5 with respect to any natural gas trades in Kansas or anywhere else.

6 Even if Plaintiffs had established a lack of corporate separateness, Plaintiffs have
7 not established a fraud or injustice would result if the Court failed to pierce the corporate
8 veil. Plaintiffs contend it would be unjust to permit DEC to reap the benefits of DETM's
9 alleged unlawful behavior by enjoying profits from DETM's trading activities while
10 escaping liability for DETM's alleged misconduct. However, the alleged illegal price
11 manipulation cannot itself constitute the fraud or injustice necessary to pierce the corporate
12 veil. Rather, DEC must have had some fraudulent intent at DETM's inception or some later
13 abuse of the corporate form such that failing to treat the entities as one would be
14 inequitable. Plaintiffs present no evidence DETM was undercapitalized at its inception.
15 DEC was not involved in forming DETM and became its indirect parent through DEC's
16 acquisition of DETM's ultimate parent, PanEnergy Corp. Further, the fact that DETM
17 operated as a legitimate business for years suggests a lack of fraudulent intent or
18 perpetration of a fraud through use of the corporate structure on the parent's part.

19 Plaintiffs' fear that it may not be able to collect on a judgment in this action
20 against DETM does not constitute fraud or injustice to support piercing the corporate veil.
21 The Court therefore finds Plaintiffs have not met their burden of establishing DETM is
22 DEC's alter ego, and the Court will not attribute DETM's contacts with Kansas to DEC for
23 purposes of determining personal jurisdiction based on alter ego principles.

24 **B. Agency**

25 Plaintiffs have failed to establish a prima facie case that DETM was DEC's
26 general agent in Kansas. DEC's primary business is the generation and supply of electricity

1 to end users in North and South Carolina. DEC also acts as a holding company, but it is not
2 purely a holding company in the sense that it does not passively hold stock in companies
3 from an unrelated range of businesses. DEC has described itself as a “an integrated energy
4 and energy services provider with the ability to offer physical delivery and management of
5 both electricity and natural gas throughout the U.S. and abroad.” (Pls.’ DEC App., Ex. B at
6 DEMDL001846.)

7 In practice, DEC itself does not perform these activities beyond the generation
8 and transmission of electricity in North and South Carolina, but holds the shares of various
9 subsidiaries which either engage in those activities or which in turn own subsidiaries which
10 perform those business operations. Among these business operations was DEC’s North
11 American Wholesale Energy business segment, which included DETM’s natural gas-related
12 activities. (Id.)

13 Although DEC identifies natural gas trading and marketing as one of its business
14 segments, Plaintiffs have not established that DETM’s sales of natural gas in Kansas were
15 sufficiently important to DEC that if DETM did not make the sales in Kansas, DEC would
16 have done so itself. DEC’s primary business was electricity generation and transmission in
17 North and South Carolina. Natural gas trading activity was a separate, fragmented
18 component of one of DEC’s other business segments operated through an indirect, partially
19 owned subsidiary. Further, the fact that DETM subsequently ceased natural gas trading in
20 2003 suggests that DETM’s trading activities were not sufficiently important to DEC that it
21 would perform the activities itself if DETM did not do so on its behalf.

22 Moreover, Plaintiffs have presented no evidence that DETM’s natural gas sales
23 in Kansas in particular were sufficiently important to DEC’s business that DEC would have
24 performed the sales in Kansas itself absent its subsidiary’s representation in the forum. See
25 Modesto City Schs., 157 F. Supp. 2d at 1135; Bulova Watch Co., Inc., 508 F. Supp. at
26 1344. Consequently, Plaintiffs have not shown that DETM’s Kansas natural gas sales

1 played a significant role in DEC's "organizational life" such that it acted as a substitute
2 for DEC in the forum.⁸ Bulova Watch Co., Inc., 508 F. Supp. at 1344. The Court therefore
3 will not attribute DETM's Kansas contacts to DEC for personal jurisdiction purposes based
4 on agency principles.

5 The Court will not attribute DETM's contacts with the forum to DEC, and DEC
6 has no contacts of its own sufficient to support personal jurisdiction. The Court therefore
7 will grant DEC's motion to dismiss for lack of personal jurisdiction.

8 **V. RELIANT ENERGY, INC.**

9 Defendant Reliant Energy, Inc. ("REI") is a Delaware corporation with its
10 principal place of business in Texas. (Def. Reliant Energy, Inc.'s Mot. to Dismiss for Lack
11 of Pers. Juris. (Doc. #869), Ex. A ["Jines Decl."] at 2.) REI as it currently exists came into
12 being in response to changes in Texas regulatory laws. (Id.) The company formerly known
13 as Reliant Energy, Incorporated divided itself into CenterPoint Energy, Inc. ("CenterPoint")
14 and Reliant Resources, Inc. ("RRI"). (Id.) After CenterPoint divested itself of its RRI
15 stock, the two companies became separate entities and RRI changed its name to REI, the
16 Defendant in this action. (Id. at 2-3.) Under the Master Separation Agreement resulting in
17 RRI's existence as a separate entity, RRI agreed that it would indemnify, defend, and hold
18 harmless Reliant Energy, Incorporated, and in certain cases, that it would cause its
19 subsidiaries to do so as well, for liabilities arising out of RRI and its subsidiaries' business
20 operations, including business operations that pre-dated the agreement. (App. of Docs.
21 Filed Under Seal ["Sealed REI App."] (Doc. #1126), Ex. E at REILJ012883, Ex. F at
22 REILJ009719.)

23
24 ⁸ The result would be the same under general Kansas agency law. Plaintiffs present no
25 evidence of any manifestation by DEC to DETM that DETM may act on DEC's account. Although
26 Plaintiffs have presented evidence DEC permitted DETM to market natural gas using the "Duke
Energy" name and logo, Plaintiffs have not presented any evidence that any third party relied on an
apparent agency between DEC and DETM.

1 REI is a holding company that does not itself buy, sell, or transport natural gas,
2 nor does it report natural gas prices to any price reporting firms or price index publishers.
3 (Jines Decl. at 3-4; Joint Supplemental Mem. of Defs. CMS Energy Corp., Duke Energy
4 Carolinas, LLC, & Reliant Energy, Inc. in Supp. of Mots. to Dismiss for Lack of Pers. Juris.
5 (Doc. #963), Reliant Energy, Inc.'s App. in Supp. of Its Mots. to Dismiss for Lack of Pers.
6 Juris. ["REI App."], Ex. B at 2.) REI does not have any offices, employees, property, bank
7 accounts, phone listings, or mailing addresses in Kansas. (REI App., Ex. C at 2, Ex. D at 2,
8 Ex. E at 2.) REI has never sold or traded natural gas in Kansas. (REI App., Ex. B at 2, Ex.
9 F at 2.) REI paid taxes in Kansas in 2001 and 2002 for business done in Kansas by its
10 subsidiary, Reliant Energy Solutions, LLC. (Sealed REI App., Ex. D at 122-23; REI App.,
11 Ex. F at 2.) REI did so because under relevant state and federal tax law, Reliant Energy
12 Solutions, LLC is disregarded for tax purposes, requiring REI to file the returns in its own
13 name. (REI App., Ex. F at 2.) Other than advertising in publications available nationwide,
14 REI has not directed advertising specifically towards Kansas. (REI App., Ex. G at 2.)

15 REI has a wholly owned subsidiary, Reliant Energy Services, Inc. ("RES").
16 (Jines Decl. at 3.) RES formerly was known as NorAm Energy Services, Inc., and it already
17 existed as a subsidiary of NorAm Energy Corp. when a company called Houston Industries
18 Incorporated acquired NorAm Energy Corp. in 1997. (REI & RES's Stip. of Fact in
19 Connection With Pers. Juris. Disc. (Doc. #1054) ["Stip."] at 2.) In 1999, Houston
20 Industries Incorporated changed its name to Reliant Energy, Incorporated and NorAm
21 Energy Services, Inc. changed its name to RES. (Id.) On December 31, 2000, RES became
22 REI's wholly owned subsidiary through the Master Separation Agreement between REI and
23 Centerpoint. (Id.)

24 RES concedes personal jurisdiction in Kansas. (Id.) However, RES did not have
25 any agency agreements or powers of attorney for REI, nor did it register or file as a foreign
26 corporation to do business in Kansas on REI's behalf. (Id. at 3.)

1 REI and RES share physical offices in Texas. (Sealed REI App., Ex. D at
2 163-64.) REI and its subsidiaries, including RES, share some common officers and
3 directors. (Sealed REI App., Ex. B.) For example, Michael Jines (“Jines”) was an officer
4 for REI, RES, and several other REI subsidiaries, including some for which he could not
5 recall the subsidiary’s name. (Sealed REI App., Ex. D at 15-19, 107-110.) At his
6 deposition, Jines stated his duties and responsibilities as an officer and director of those
7 subsidiaries would be “no different” than his duties and responsibilities as REI’s general
8 counsel. (Id. at 119-20.) As RES’s one hundred percent owner, REI nominates and elects
9 the directors for RES. (Id. at 88-89.)

10 At the present time, REI and RES have no employees of their own. (Id. at 248,
11 288-89.) Rather, Reliant Energy Corporate Services (“RECS”), an REI subsidiary, acts as
12 the payroll entity for REI and all of its subsidiaries. (Id. at 9-10.) RECS employs personnel
13 who provide services to REI and RES. (Id. at 10.) For example, lawyers employed by
14 RECS provide legal services to REI and all of its subsidiaries. (Id. at 111-13.) RECS also
15 provides accounting, finance, legal, human resources, and facilities management services to
16 REI and its subsidiaries. (Id. at 20.) As part of these services, RECS prepares separate
17 financial documents, including tax filings, for RES. (Id. at 56-57, 267.) REI permitted
18 RES to use the “Reliant Resources” and “Reliant Energy” trademarks and trade names
19 during the relevant period. (Stip. at 3.)

20 In terms of financial dealings between REI and its subsidiaries, the subsidiaries
21 are funded by borrowing from or receiving equity capital infusions from REI. (Sealed REI
22 App., Ex. D at 239-40.) In turn, REI receives either loan repayments or dividends when
23 money is transferred from the subsidiaries to REI. (Id. at 291-92.) REI received dividends
24 from RES during the relevant time period. (Stip. at 4.) In some circumstances, REI
25 provides guarantees to third parties in transactions involving REI subsidiaries. (Sealed REI
26 App., Ex. D at 204-05.) REI agreed to be RES’s guarantor when RES’s counterparties

1 required it. (Stip. at 2.) In setting forth its financial guarantee policy, REI (then RRI)
2 described RES as a “business unit.” (Sealed REI App., Ex. H at REILJ010083.)

3 Although describing itself as a holding company, REI does not passively hold
4 stock in its subsidiaries and leave them to operate on their own. Rather, REI establishes
5 overall policies and guidelines for its subsidiaries, establishes a capital structure, and issues
6 consolidated financial reports. (Sealed REI App., Ex. D at 131.) Among the guidelines
7 REI requires its subsidiaries to follow is a policy for best principles and practices. (Sealed
8 REI App., Ex. I at REILJ012703.) This policy requires compliance with applicable laws
9 and regulations, and requires that all transactions be for a bona fide business purpose and be
10 reported accurately. (Id.) The best practices policy prohibits wash sales and fictitious
11 transactions. (Id. at REILJ012704.) This policy applied to RES during the relevant period.
12 (Sealed REI App., Ex. N at 93.)

13 Additionally, REI sets certain risk control limits on its subsidiaries. For example,
14 REI set limits on RES’s value at risk (“VAR”). (Sealed REI App., Ex. F at REILJ009749.)
15 REI’s board of directors sets the overall limit on VAR. (Id.) The Audit Committee of
16 REI’s board meets at least three times a year to approve the risk control organization
17 structure, approve the overall risk control policy, monitor compliance with trading limits,
18 and review risk control issues. (Id. at REILJ009752.)

19 REI also has a Risk Oversight Committee consisting of REI and subsidiary
20 officers which allocates VAR to various business segments, including RES. (Sealed REI
21 App., Ex. M at 17, Ex. F at REILJ009752.) The Risk Oversight Committee meets at least
22 monthly to monitor compliance, review daily position reports for trading and marketing
23 activity, recommend to REI’s board of directors adjustments to trading limits, approve new
24 trading activity, monitor information systems related to risk management, and place
25 guidelines and limits on hedging activity. (Sealed REI App., Ex. F at REILJ009752-53.)
26 Management for each business segment then allocates risk limits among individual traders

1 within the limits set by the Risk Oversight Committee. (Id. at REILJ009754.) RES
2 allocates VAR to its “head book traders” who in turn authorize other traders to execute
3 trades. (Sealed REI App., Ex. M at 17.) Thus, the VAR limit set by REI was “an overall
4 limit.” (Sealed REI App., Ex. N at 155.) RES would engage in multiple transactions in one
5 day, and the limit set by REI was evaluated against the net result of a set of RES’s
6 transactions or activities. (Id.)

7 REI oversight of its subsidiaries includes daily reporting of mark-to-market
8 valuation,⁹ VAR, and “other risk measurement metrics.” (Sealed REI App., Ex. L.) RES’s
9 VAR is reported daily to REI’s Risk Oversight Committee. (Sealed REI App., Ex. M at
10 17.) Additionally, violations of any risk limits are reported to the business segment
11 management as well as to the appropriate committees. (Sealed REI App., Ex. F at
12 REILJ009754.) While the reports from the subsidiary to the various committees may occur
13 daily, communications from REI down to the subsidiaries occurs “only to the extent that the
14 activity ended up in a violation.” (Sealed REI App., Ex. N at 156.) For example, if RES
15 exceeded its VAR limit, an REI officer may inform RES management and inquire as to
16 what RES management intended to do to correct the situation. (Id.) However, “in terms of
17 the day-to-day buying and selling of gas or power, [REI officers have] limited or no
18 interaction.” (Id.)

19 In November 2003, the CFTC entered into a settlement with RES regarding the
20 CFTC’s allegations that RES violated the Commodities Exchange Act. (Decl. of William
21 E. Fischer (Doc. #1104), Ex. B, Jines Ex. 4.) According to the settlement, the CFTC found
22 RES’s Houston offices made false price reports regarding natural gas transactions from
23 1999 through May 2002. (Id. at 4-5.) Additionally, the CFTC found RES engaged in wash
24 trades in 2000. (Id. at 6-7.) As part of the settlement, RES and REI agreed to entry of the

25 ⁹ “Mark-to-market” means the value of a contract relative to current market prices. (Sealed
26 REI App., Ex. N at 128.)

1 order finding violations, as well as requiring RES to cease and desist from its misconduct,
 2 imposing an \$18 million civil penalty on RES, and requiring RES and REI to undertake
 3 certain activities. (Id. at 7-9.) Specifically, REI agreed to cooperate with the CFTC in the
 4 future, including preserving and producing records regarding the reporting of price or trade
 5 volumes in natural gas transactions and producing RES and REI employees to provide
 6 assistance in any trial, proceeding, or investigation related to the CFTC's investigation. (Id.
 7 at 8-9.) Additionally, REI agreed not to make any public statements denying the CFTC's
 8 findings in the order. (Id. at 9.) Jines represented both RES and REI relating to the CFTC's
 9 investigation and the terms of the CFTC's order. (Sealed REI App., Ex. D at 41-44.)

10 RES stopped speculative gas trading in March 2003. (Stip. at 3.) Since then,
 11 RES "has continued to buy and sell natural gas for the purpose of meeting and hedging its
 12 obligations to supply gas-fired power plants owned by Reliant Energy Power Generation,
 13 Inc. and other RES affiliates, and to meet gas supply commitments it has made." (Id.)

14 Plaintiffs concede they are not contending this Court may assert personal
 15 jurisdiction over REI based on REI's own contacts with Kansas. (Pls.' Joint Opp'n to
 16 Reliant Energy, Inc.'s Mot. to Dismiss for Lack of Pers. Juris. (Doc. #1106) at 4-5.)
 17 Consequently, REI is subject to personal jurisdiction in Kansas only if the forum acts of its
 18 subsidiary, RES, are attributable to it through alter ego or agency principles.¹⁰

19 **A. Alter Ego**

20 Plaintiffs have failed to establish a prima facie case of personal jurisdiction based
 21 on RES being REI's alter ego. REI provided financing to RES and in return received loan
 22 repayments and/or dividends, but no evidence in the record suggests REI failed to maintain
 23 corporate formalities or to properly document these loans and capital contributions. Rather,
 24 the evidence indicates RECS prepared separate books and records for RES and REI.

25 ¹⁰ The Court will assume that if RES's forum-related acts are attributable to REI, the Kansas
 26 long-arm statute is satisfied.

1 REI's conduct in acting as a guarantor for RES also does not support an alter ego
2 finding, and the evidence presented on this point suggests the opposite. REI had in place
3 specific policies regarding when it would consider acting as its subsidiary's guarantor,
4 suggesting that the two corporations and their counterparties viewed the two as separate
5 entities not liable for the other's obligations except where they contractually agreed to such
6 an arrangement. Further, REI's reference to RES as a "business unit" in a report does not
7 suggest RES was REI's mere instrumentality. Nor does the fact that the two companies
8 shared office space and staff.

9 REI's oversight of RES is consistent with the parent's investor status. As one
10 hundred percent owner of RES's shares, REI was entitled to nominate and elect RES's
11 board of directors. Additionally, REI is entitled as an investor to monitor RES's
12 performance. Consequently, the daily reporting of information from RES to REI is
13 consistent with REI's investor oversight role. Although REI received daily reporting from
14 RES, no evidence suggests REI gave daily control commands to RES. Rather, the record
15 demonstrates that, consistent with its investor status, REI set general policies and guidelines
16 regarding best policies and practices, as well as certain overall limits, such as the limit on
17 VAR. However, when it came to RES's day-to-day conduct of its business within these
18 guidelines, REI had little to no role. For example, with respect to natural gas trading, while
19 REI set overall limits on certain metrics, REI had no role in making the day-to-day
20 decisions of who RES was to trade with, when, for what amount of natural gas, and at what
21 price. Only when RES exceeded REI's overall limits would REI become involved by
22 inquiring of its subsidiary what it intended to do to correct any violations. Plaintiffs also
23 present no evidence REI had any role in RES's price reporting to indices.

24 Finally, Plaintiffs' reference to the Master Separation Agreement does not
25 support a finding of alter ego. That RRI/REI agreed with Reliant Energy, Incorporated that
26 it and its subsidiaries would assume liability for those business operations which would

1 remain with RRI/REI post-separation does not mean REI agreed it would waive personal
2 jurisdiction with respect to claims made by other persons not a party to that contract, or that
3 it, as opposed to the relevant subsidiary, was liable for any particular claim.

4 Even if Plaintiffs had established a lack of corporate separateness, Plaintiffs have
5 not established a fraud or injustice would result if the Court failed to pierce the corporate
6 veil. Plaintiffs contend it would be unjust to permit REI to reap the benefits of RES's
7 alleged unlawful behavior by enjoying profits from RES's trading activities while escaping
8 liability for RES's alleged misconduct. However, the alleged illegal price manipulation
9 cannot itself constitute the fraud or injustice necessary to pierce the corporate veil. Rather,
10 REI must have had some fraudulent intent at RES's inception or some later abuse of the
11 corporate form such that failing to treat the entities as one would be inequitable. Plaintiffs
12 present no evidence RES was undercapitalized at its inception. RES was formed years
13 before REI became its parent company, and thus REI was not even involved in capitalizing
14 RES at its inception. Further, the fact that RES operated as a legitimate business for years
15 suggests a lack of fraudulent intent or perpetration of a fraud through use of the corporate
16 structure on the parent's part.

17 Plaintiffs' fear that they may not be able to collect on a judgment in this action
18 against RES does not constitute fraud or injustice to support piercing the corporate veil.
19 The Court therefore finds Plaintiffs have not met their burden of establishing RES is REI's
20 alter ego, and the Court will not attribute RES's contacts with Kansas to REI for purposes
21 of determining personal jurisdiction based on alter ego principles.

22 **B. Agency**

23 Plaintiffs have failed to establish a prima facie case that RES was REI's general
24 agent in Kansas. REI's business is not purely as a holding company in the sense that it does
25 not passively hold stock in companies from an unrelated range of businesses. REI (then
26 RRI) has described itself as a "provider of electricity and energy services with a focus on

1 the competitive segments of the electric power industry in the United States and Europe.”
2 (Sealed REI App., Ex. K at REILJ009826.) REI describes its business as acquiring,
3 developing, and operating electric power generation facilities; trading and marketing power,
4 natural gas, and other energy-related commodities; and providing retail electric services in
5 Texas. (Id.) REI has asserted in public filings that its--

6 trading, marketing, and risk management skills complement [its]
7 generation positions. The combination provides greater scale and skill
8 associated with the management of our fuel and power positions,
9 sophisticated commercial insights and an understanding of the key
10 regions in which we participate, and a wider range of ways in which
11 we participate in the market and are able to meet customer needs.

12 (Id.)

13 In practice, REI itself does not perform these activities, but, as Jines stated in his
14 deposition, REI “holds the shares of the different subsidiaries that are actually engaged in
15 the different business operations of [REI].” (Sealed REI App., Ex. D at 129-30.) Among
16 those business operations was REI’s “wholesale” group, which included a variety of
17 subsidiaries involved in wholesale-related activities, including RES’s natural gas-related
18 activities. (Id. at 285-86.)

19 Although REI identifies natural gas trading and marketing as one of its business
20 lines, Plaintiffs have not established that RES’s sales of natural gas in Kansas were
21 sufficiently important to REI that if RES did not make the sales in Kansas, REI would have
22 done so itself. As the California Court of Appeal found in evaluating this same question
23 involving a similar lawsuit against REI and RES in California, “[t]his portion of the energy
24 business appears to be sufficiently fragmentary so that [REI] could have operated without
25 the assistance of RES.” Reliant Energy, Inc. v. Superior Court, No. D049988, 2007 WL
26 4329488, at *18 (Cal. Ct. App. 2007) (unpublished). Further, the fact that REI
subsequently ceased “proprietary trading activities” due to a significant trading loss arising
from “the extreme volatility in natural gas prices” suggests that RES’s trading activities

1 were not sufficiently important to REI that it would perform the activities itself if RES did
2 not do so on its behalf. (Sealed REI App., Ex. G.)

3 Moreover, Plaintiffs have presented no evidence that RES's natural gas sales in
4 Kansas in particular were sufficiently important to REI's business that REI would have
5 performed the sales in Kansas itself absent its subsidiary's representation in the forum. See
6 Modesto City Schs., 157 F. Supp. 2d at 1135; Bulova Watch Co., Inc., 508 F. Supp. at
7 1344. Consequently, Plaintiffs have not shown that RES's Kansas natural gas sales played
8 a significant role in REI's "'organizational life'" such that it acted as a substitute for REI in
9 the forum. Bulova Watch Co., Inc., 508 F. Supp. at 1344.

10 The Court acknowledges that the California Court of Appeal upheld a state trial
11 court's ruling that RES was REI's agent in California for natural gas trading activity during
12 the relevant time period. Reliant Energy, Inc., 2007 WL 4329488, at *17. Although arising
13 out of the same factual background and involving the same parent and subsidiary, the ruling
14 is distinguishable on several grounds. The evidence presented to the California state court
15 indicated REI had several significant contacts with California whereas Plaintiffs concede
16 REI has no contacts with Kansas, as reflected in the evidence before this Court. According
17 to the evidence in Reliant, REI owned another subsidiary that had purchased natural-gas-
18 fueled power plants located in California. Id. at *2. Additionally, REI obtained a
19 certificate of qualification to do business and designated an agent for service of process in
20 California, acted as guarantor on seven agreements between RES and California utilities,
21 engaged in a marketing campaign in the state, subleased a small office in Sacramento which
22 was used by a lobbyist, and employed an individual who allegedly engaged in illegal
23 churning and wash trades in California. Id. at *3-4.

24 In accord with this Court's ruling, the California Court of Appeal specifically
25 rejected RES was REI's agent under the same test the Ninth Circuit employs to determine
26 whether a subsidiary is its parent's agent for personal jurisdiction purposes. Compare id. at

1 *17-18, with Doe, 248 F.3d at 928. The California Court of Appeal referred to this test as
2 the “representative services doctrine.” Reliant Energy, Inc., 2007 WL 4329488, at *17-18.
3 While finding RES was not REI’s agent under the representative services doctrine, the
4 Reliant court concluded RES was REI’s agent in California under general agency principles
5 based on REI’s control over RES. Id. at *15-17. Although not calling it the “representative
6 services doctrine,” the Ninth Circuit has set forth that test as the applicable one for due
7 process purposes. The California Court of Appeal’s reference to other agency principles
8 goes beyond the applicable agency test for exercising personal jurisdiction consistent with
9 due process as set forth in controlling precedent for this Court.

10 Moreover, in making its finding under general agency principles, the California
11 Court of Appeal relied on evidence not presented to this Court and not relevant to REI’s
12 contacts with Kansas. For example, the Reliant court considered the fact that RES made a
13 daily report to REI of the California power plant’s hedging activities, “regarding the
14 coordination of power generation and supply of natural gas,” and RES’s trading activities
15 impacted that supply of natural gas. Id. at *16. Additionally, evidence in the record
16 permitted an inference that the employee who allegedly engaged in wash trades and
17 churning in California was an REI (then RRI) employee. Id.

18 The California Court of Appeal also found REI’s setting and raising of overall
19 limits such as VAR to be significant evidence of REI’s daily control of RES. However, as
20 explained above, the evidence before this Court indicates REI sets overall limits but does
21 not involve itself in RES’s day-to-day decisions as to what actions to take within those
22 limits. That RES violated those limits and requested a higher limit, to which REI agreed, is
23 not evidence of day-to-day control. It is evidence of a change in the overall limit under
24 which RES was to perform its day-to-day operations.

25 To the extent the setting and changing of VAR and other limits constitutes day-
26 to-day control, Plaintiffs have not demonstrated that REI’s setting or altering of overall

1 limits on any metric constituted day-to-day interference with RES's sales in Kansas.
2 Plaintiffs have presented no evidence that REI's oversight impacted RES's daily decisions
3 regarding whether, when, to whom, in what volume, or at what price RES decided to sell
4 natural gas in Kansas. While daily oversight of trading activities may have been significant
5 in the Reliant case where an employee of REI or one of its subsidiaries allegedly engaged in
6 illegal trading activity in California, REI's daily oversight mechanisms as presented to this
7 Court do not suggest a significant level of control over RES's Kansas sales activity.
8 Because Plaintiffs have not established a prima facie case that RES acted as REI's agent in
9 Kansas, the Court will not attribute RES's Kansas contacts to REI on this basis.¹¹

10 The Court will not attribute RES's contacts with the forum to REI, and REI has
11 no contacts of its own sufficient to support personal jurisdiction. The Court therefore will
12 grant REI's motion to dismiss for lack of personal jurisdiction.

13 VI. REQUEST FOR DEFERRED DECISION

14 Plaintiffs suggest that because the personal jurisdiction question is intertwined
15 with the merits, the Court should defer ruling on the personal jurisdiction issue until after
16 merits discovery is completed. Plaintiffs rely on Data Disc, Inc., 557 F.2d at 1285 n.2.
17 However, Data Disc, Inc. states that where the jurisdictional issues are intertwined with the
18 merits, the Court may require the plaintiff to establish "only . . . a prima facie showing of
19 jurisdictional facts with affidavits and perhaps discovery materials." Id. As the Court is
20 considering the personal jurisdiction issue on the basis of affidavits and documentary
21 evidence without holding an evidentiary hearing, the Court is following Data Disc, Inc. by
22 holding Plaintiffs to this standard, and is not requiring Plaintiffs to meet the higher burden

23
24 ¹¹ The result would be the same under general Kansas agency law. Plaintiffs have presented
25 no evidence of any express or implied manifestation from REI to RES that RES may act as REI's agent
26 in Kansas. As to apparent agency, Plaintiffs have presented evidence that REI permitted RES to use
the "Reliant" name and logo in marketing natural gas in Kansas. However, Plaintiffs have presented
no evidence that anyone relied on an apparent agency relationship between REI and RES.

1 of demonstrating personal jurisdiction by a preponderance of the evidence, as Plaintiffs
2 would have to do at an evidentiary hearing or at trial. Id.

3 Moreover, Plaintiffs have not convinced the Court that further discovery would
4 produce a different result. Although Plaintiffs contend DEC obstructed jurisdictional
5 discovery regarding its participation in the conspiracy, DEC provided Plaintiffs with every
6 DEC document which DEC provided to the CFTC in conjunction with the CFTC's
7 investigation of DETM's natural gas trading activity in the relevant time period. (Mem. of
8 Defs. Duke Energy Carolinas, LLC & Duke Energy Trading & Marketing, LLC in Opp'n to
9 Pls.' Mot. to Compel Disc. (Doc. #935) ["Opp'n to Mot. Compel"], Ex. B at 2; Tr. of
10 Proceedings (Doc. #1138) at 55.) The documents provided to the CFTC consisted almost
11 entirely of DETM documents. (Opp'n to Mot. Compel, Ex. B at 2; Tr. of Proceedings at
12 55.) The only DEC documents consisted of general risk management policies and board of
13 director meeting minutes, which DEC has provided to Plaintiffs. (Opp'n to Mot. Compel,
14 Ex. B at 2; Tr. of Proceedings at 55-56.)

15 REI also answered Plaintiffs' discovery on the issue of conspiracy as it relates to
16 REI. REI had no documents related to communications between REI and the other
17 Defendants about natural gas prices and had no documents in which REI directed a
18 subsidiary's communications, price reporting, or trading. (Partial Tr. (Doc. #1128) at 49-
19 50.) REI objected to the extent that Plaintiffs sought every communication made by its
20 subsidiary, RES, to other alleged co-conspirators. Such communications would not
21 demonstrate REI's participation in a conspiracy, and thus would not demonstrate REI was a
22 member of a conspiracy directed at Kansas.¹²

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25 ¹² CMS objected to discovery related to the conspiracy theory. The Court is unable to
26 determine from the record whether CMS searched its own records and advised Plaintiffs it had no responsive documents as its co-Defendants have done.

1 The Court has denied Plaintiffs' motion to compel discovery raising these issues.
2 (Pls.' Mot. to Compel Disc. from Def. CMS Energy Corp. (Doc. #904); Pls.' Mot. to
3 Compel Disc. from Def. CMS Energy Corp. (Doc. #906); Pls.' Mot. to Compel Disc. from
4 Defs. Duke Energy Carolinas, LLC & Duke Energy Trading & Marketing, LLC (Doc.
5 #898) & Mem. in Supp. (Doc. #899); Pls.' Mot. to Compel Disc. from Def. Reliant Energy,
6 Inc. (Doc. #910) & Mem. in Supp. (Doc. #911); Order (Doc. #1240).) Plaintiffs seek
7 further discovery on the conspiracy theory of personal jurisdiction, a theory of questionable
8 legitimacy. See Chirila v. Conforte, 47 F. App'x 838, 842, 2002 WL 31105149, at *3 (9th
9 Cir. 2002) (unpublished). In any event, nothing suggests further discovery will establish
10 Defendants CMS, DEC, or REI participated in a conspiracy targeting known Kansas
11 residents. The Court therefore will decline Plaintiffs' request to defer the personal
12 jurisdiction issue to be resolved with the merits.

13 **VII. CONCLUSION**

14 IT IS THEREFORE ORDERED that Specially Appearing Defendants CMS
15 Energy Corporation, Duke Energy Carolinas, LLC, and Reliant Energy, Inc.'s Motion to
16 Dismiss for Lack of Personal Jurisdiction (Doc. #961) is hereby GRANTED. Defendants
17 CMS Energy Corporation, Duke Energy Carolinas, LLC, and Reliant Energy, Inc. are
18 hereby dismissed from this action for lack of personal jurisdiction.

19
20 DATED: February 23, 2009

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23 PHILIP M. PRO
24 United States District Judge
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